

THE WHITE HOUSE

Washington

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MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: NEIL EGGLESTON  
COUNSEL TO THE PRESIDENT

SUBJECT: Critical Vacancies and the Presidential Transitions Improvements Act of 2015

The recently enacted Edward ‘Ted’ Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015 (“Act”) imposes a number of requirements related to a presidential transition. *See* Public Law 114-136 (Mar. 18, 2016) (amending the Presidential Transition Act of 1963, 3 U.S.C. § 102 note). Among them is a requirement that each agency head, for each noncareer position that the agency head determines is critical, designate a qualified career employee to serve in the position in an acting capacity if the position becomes vacant. 3 U.S.C. 102 note, § 4(f)(2). The relevant provision, section 4(f)(2), directs that such designations shall be made “in accordance with” the Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345-3349d. This memorandum, issued after consultation with the Department of Justice’s Office of Legal Counsel, provides guidance on the implementation of that provision. For the reasons discussed below, we request that agency heads, by September 15, submit to the President the name of a career employee for each critical, Senate-confirmed position who would be eligible for presidential direction to serve as an acting officer under section 3345(a)(3) in the event of a vacancy.

Section 4(f)(2) states in full that:

Not later than September 15 of a year during which a Presidential election occurs, and in accordance with subchapter III of chapter 33 of title 5, United States Code, for each noncareer position in an agency that the head of the agency determines is critical, the head of the agency shall designate a qualified career employee to serve in the position in an acting capacity if the position becomes vacant.

3 U.S.C. § 102 note, § 4(f)(2). The referenced subchapter of the U.S. Code contains the Vacancies Reform Act, which generally governs the filling of vacant, Senate-confirmed positions within executive agencies on an acting basis. “Critical” positions could include Senate-confirmed positions, for which the VRA applies. (“Critical” positions might also include other noncareer positions not subject to Senate confirmation. The considerations discussed in this Guidance do not apply to those positions.)

Although section 4(f)(2) directs agency heads to designate qualified career individuals to serve in an acting capacity “in accordance with” the VRA, agency heads do not have authority under the VRA to designate individuals to serve as acting officers for Senate-confirmed positions.

Rather, 5 U.S.C. § 3345(a)(1) provides that, in the event of a vacancy in such a position, the first assistant to the vacant position “shall perform the functions and duties of the office temporarily in an acting capacity,” without any action by the agency head. Under the VRA, only the President has the authority to override that default by “direct[ing]” either a Senate-confirmed official from any agency or an eligible senior agency employee from the agency in which the vacancy arose “to perform the functions and duties of the vacant office temporarily in an acting capacity.” 5 U.S.C. § 3345(a)(2), (a)(3).

To avoid a conflict with the VRA, section 4(f)(2)’s requirement that agency heads “designate” acting officers is best understood to mean that agency heads should, for each critical, Senate-confirmed position to which the VRA applies, provide the President with the name of a career senior agency employee who would be eligible for a presidential “direct[ion] . . . to perform the functions and duties of a vacant office” under section 3345(a)(3) of the VRA in the event of a vacancy.<sup>1</sup> An agency head’s designation under section 4(f)(2) will not have the effect of actually directing the employee to serve as an acting officer, which the agency head cannot do “in accordance” with the VRA. Instead, the designation that section 4(f)(2) requires will operate as a recommendation to the President of an individual he could consider directing to perform the functions and duties of the office in an acting capacity in the event of a vacancy. The section thus requires planning for the presidential transition period, during which noncareer officials may not be available to serve as acting officers. If the agency-designated individual is to serve as an acting officer in the event of a vacancy, the President would separately have to direct that individual under section 3345(a)(3).

Section 4(f)(2)’s requirement that it be carried out in accordance with the VRA suggests that all of the President’s authorities under the VRA with respect to Senate-confirmed positions remain unchanged, and there is nothing in the legislative history to indicate that Congress intended otherwise. Thus, an agency head’s designation of a career employee under section 4(f)(2) would not constrain the President’s ability to invoke section 3345(a)(2) or (a)(3) to direct an individual of his own choosing to serve in an acting capacity. Nor would designations under section 4(f)(2) impact the operation of agency orders of succession that the President has issued as an advance exercise of his authority to direct individuals to serve as acting officers for Senate-confirmed positions under the VRA. Similarly, section 4(f)(2) would not limit statutory authorities that provide for the selection of acting officers for Senate-confirmed positions separate from the mechanisms set out in the VRA. *See* 5 U.S.C. § 3347; S. Rep. 105-250, 16-17 (1998). Both the text of section 4(f)(2) and the legislative history are silent regarding these other statutes, and there is nothing to indicate that Congress intended to supersede them. Therefore, for critical positions covered by both the VRA and a specific statute that provides for the selection of an acting officer, the specific statutes continue to be an available means for the selection of acting officers.

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<sup>1</sup> As set out in section 3345(a)(3), eligible employees are those who served in a position within the agency for at least 90 days in the year preceding the vacancy for which the rate of pay is at least the minimum rate of pay for a position at GS-15 of the General Schedule.

## CONCLUSION

To ensure implementation of section 4(f)(2) in a manner consistent with the Vacancies Reform Act, we request that agency heads, by September 15, submit to the President the name of a career employee for each critical, Senate-confirmed position who would be eligible for presidential direction to serve as an acting officer under section 3345(a)(3) in the event of a vacancy. The authorities available under the VRA and other statutes expressly providing for the selection of acting officers for Senate-confirmed positions will not be restricted by these submissions.